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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529 - 2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: HARTFORD Date: JUN 05 2009

MSC-06-089-10943

IN RE: Applicant: [redacted]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.,* CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, or *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.,* CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004, (CSS/Newman Settlement Agreements) was denied by the director of the Hartford office, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet. The director denied the application, finding that the applicant had not established by a preponderance of the evidence that she had continuously resided in the United States in an unlawful status for the duration of the requisite time period.

In addition, the director determined that the applicant failed to establish that she is eligible for class membership pursuant to the terms of the CSS/Newman settlement agreements since the applicant stated at the time of her interview that her father applied for legalization in 1987 or 1988, while the applicant's father testified that he applied for legalization, on behalf of the entire family, some time in 1989. By adjudicating the application on the merits, the director treated the applicant as a class member. The AAO will adjudicate the appeal of the denied application.

On appeal, counsel asserts that the applicant has established her unlawful residence for the requisite time period. The AAO has considered counsel's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.[1]

An applicant for temporary resident status must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term "until the date of filing" in 8 C.F.R. § 245a.2(b) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

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[1] The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C.§ 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has long been recognized by the federal courts. *See, e.g. Dor v. INS,* 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. *See* 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

Even if the director has some doubt as to the truth, if the applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho,* 19 I & N Dec. 582, 591-592 (BIA).

The issue in this proceeding is whether the applicant (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of her claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period

consists of several affidavits and letters, and copies of school records. The AAO has reviewed each document in its entirety to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision. Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed.

The applicant submitted a copy of an affidavit and a letter from [redacted] dated 8-29/30 (sic) and September 16, 1992, respectively. [redacted] states that she met the applicant and her family in 1981 when the affiant was living in Sealy, Texas, and that she helped the applicant enroll at Sealy Junior High School. She states that the applicant and her family have lived in the United States since 1981.

The record contains a copy of an affidavit from [redacted] who states the applicant lived at [redacted] in Sealy, Texas from 1979 until 1985. She states that she met the applicant and her parents when they came into her restaurant. [redacted] statement of the applicant's dates of residence at [redacted] in Sealy, Texas is inconsistent with the statements of the applicant in the instant I-687 application, in which the applicant states that she resided at that address from 1982 until 1985.

The applicant submitted a copy of an affidavit from [redacted] who states that she met the applicant and her mother in 1982 when they lived in Sealy, Texas. [redacted] also states that the applicant moved to Connecticut in 1988. However, this is inconsistent with the applicant's statement in the instant I-687 application that she continued to live in Sealy, Texas throughout 1988.[2]

The record contains the affidavit of [redacted] who claims to have known the applicant for more than twenty years. He states that in 1987, when he and the applicant were residing in California, he and the applicant, along with the applicant's parents, traveled to Mexico on or about December 20, 1987. [redacted] states that after he returned to California, he again saw the applicant and her family in California some time in the first week of January of 1988. This statement is inconsistent with the applicant's statement in the instant I-687 application that she resided in Texas in 1987 and 1988. In addition, when the applicant filed the instant Form I-687, she stated that her only absence from the United States was some time in 1984.

The record contains a letter from [redacted] who states that she first met the applicant and her family in October or November, 1980, and that they lived with her in her trailer home at [redacted] in Sealy, Texas for five or six months. The applicant does not list this address as a residence on the instant I-687 application. [redacted] also states that the applicant moved to California in 1985. This also is inconsistent with the applicant's statement in the instant I-687 application that she lived in Texas for the duration of the requisite statutory period.

The applicant submitted almost identical affidavits from [redacted] and [redacted]. Ms. [redacted] states that she has known the applicant since 1982 because her daughter went to school and was friends with the applicant. [redacted] states that she has known the applicant since 1982 because her sister went to school with the applicant. The record also contains a copy of an affidavit from [redacted]

[2] In the instant I-687 application, the applicant does not list the year in which she moved to Connecticut.

who states that she attended Sealy Middle School with the applicant for a couple of months in 1981, at which time the applicant was residing at [redacted] However, the applicant does not list this address as a residence address in the instant I-687 application. In addition, school records contained in the record state that the applicant attended Sealy Middle School from August 30, 1982 until January 20, 1983.

The record also contains a copy of an affidavit from who states that she has known the applicant since 1985.

Although the witnesses claim to have personal knowledge of the applicant's residence in the United States during the requisite period, none of the witness statements provides concrete information, specific to the applicant and generated by the asserted associations with her, which would reflect and corroborate the extent of those associations, and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence in the United States during the requisite period. For instance, the witnesses do not state how they date their initial meeting with the applicant, how frequently they had contact with the applicant, and how they had personal knowledge of the applicant's presence in the United States during the requisite period. Upon review, the AAO finds that, individually and together, the witness statements do not indicate that their assertions are probably true. In addition, the many discrepancies among the witnesses' statements detract from the credibility of the applicant's claim. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho,* 19 I & N Dec. 582, 591-592 (BIA). Therefore, they have minimal probative value.

Additional evidence in the record is comprised of copies of the applicant's school records from Sealy, Texas, which state her enrollment in sixth grade from August 30, 1982 until her withdrawal on January 20, 1983.[3] Also contained in these records is a list of vaccinations the applicant received on August 24, 1982. Although these records are evidence of the applicant's residence in the United States for the time period from August 24, 1982 until January 20, 1983, they do not establish the applicant's continuous residence for the duration of the requisite statutory period.

The remaining evidence in the record is comprised of copies of the applicant's statements, the instant Form I-687, a Form I-485 application to adjust to permanent resident status under the Legal Immigration Family Equity (LIFE) Act, and the applicant's initial Form I-687 application filed in 1990 to establish the applicant's CSS class membership.

The AAO finds in its *de novo* review that the record of proceedings contains many materially inconsistent statements from the applicant regarding her residences in and absences from the United States during the requisite statutory period.

The record reveals that the applicant's initial I-687 application listed residences in Texas from 1979 to 1985, then a residence in California from 1985 through the remainder of the requisite statutory period.

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[3] In reviewing the school records, it is not clear which school the applicant attended, since the school records contain the names of both Sealy High School and Sealy Junior Hugh School for this period of time.

Regarding absences from the United States, in a separate class membership worksheet dated December 6, 1990, and in a statement dated December 18, 1990, the applicant stated that she departed the United States on December 20, 1987 and returned on January 4, 1988. However, in an August 5, 1993 statement, the applicant stated that she left the United States one time only for one month in 1985. In addition, the application states that the applicant last entered the United States on June 21, 1979.

At the time of filing her I-485 application, the applicant listed residences in Texas from 1980 to 1985, then in Connecticut from 1985 for the remainder of the requisite statutory period.[4] Regarding her absences, on her Form I-485, the applicant stated that she last entered the United States illegally in January 1986, at Aguas Prieto in Texas.

Finally, regarding the instant Form I-687, at the time of interview the applicant stated that she first entered the United States in 1979, and that she left the United States for one time only for one month in 1984. The instant application lists residences in Texas from 1980 for the duration of the requisite statutory period. [5]

The applicant's many contradictions are material to her claim in that they have a direct bearing on the applicant's residence in the United States for the duration of the requisite period. As stated above, doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho, supra.* The contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

As stated previously, to meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony, and the sufficiency of all the evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6). Here, the applicant has failed to provide probative and credible evidence of her continuous residence in the United States for the duration of the requisite period. The applicant's evidence lacks sufficient detail, and there are material inconsistencies in the record.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that she is eligible for the benefit sought. The various statements and affidavits currently in the record which attempt to substantiate the applicant's residence and employment in the United States during the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that she maintained continuous residence in the United States throughout the statutory period, and thus are not probative.

The AAO also notes that the applicant appears to be inadmissible since a civil surgeon designated by United States Citizenship and Immigration Services (USCIS) has determined through medical examination that the applicant has tested positive for the HIV/AIDS virus. Although this ground of

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[4] However, the listing of Connecticut, instead of California, may be a typographical error, since the listed street address is the same as the address in California listed on the applicant's initial I-687 application.

[5] However, the applicant also lists membership in a California church from 1985 for the remainder of the requisite statutory period.

inadmissibility is waivable, even if the applicant were to be granted a waiver she remains ineligible for failure to establish her continuous unlawful residence.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that she entered the United States before January 1, 1982 and continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--, supra.* The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.